Supreme Court, U.S.
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No. 98-1225

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

LARRY BARNES, SR., M.D.,

Petitioner,

vs.

LOWE'S COMPANIES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Fourth Circuit properly affirm the District Court's dismissal of Petitioner's federal claims based upon Petitioner's failure to allege a valid constitutional or statutory basis for his claims or to allege sufficient facts in the Complaint setting forth a valid claim of racial discrimination?

PARTIES TO THE PROCEEDING

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of this Respondent's Brief in Opposition.

STATEMENT PURSUANT TO RULE 29.6

Lowe's Companies, Inc., is the parent company of Lowe's Home Centers, Inc., which is a wholly owned subsidiary of Lowe's Companies, Inc. The Contractor Yard, Inc., is a wholly owned subsidiary of Lowe's Home Centers, Inc.

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STATEMENT OF THE CASE

A. Procedural History

On December 30, 1997, Plaintiff-Petitioner Larry Barnes (hereinafter referred to as "Petitioner") filed this action against the Defendant-Respondent Lowe's Companies, Inc. (hereinafter referred to as "Lowe's") in the United States District Court for the Eastern District of North Carolina. In the Complaint, Petitioner alleges that upon leaving a Lowe's store on December 30, 1995, he was approached by a Lowe's employee who asked to check Petitioner's shopping bags and verify his receipt. Petitioner, a black male, alleges in the Complaint that this conduct constituted "mercantile racism." He further asserts that his federal constitutional rights were violated by the Lowe's employee. Specifically, he alleges that Lowe's violated his rights pursuant to the Thirteenth and Fourteenth Amendments and that a cause of action for "mercantile racism" is actionable pursuant to 42 U.S.C. §§ 2000(a-e), 1981, 1982, 1983 and 1985. Petitioner also includes in the Complaint the following state tort causes of action: false imprisonment, defamation, corporate malpractice and negligence. Petitioner seeks compensatory damages in the amount of one million dollars and punitive damages in the amount of twenty-five million dollars. (Respdt. App. A)

Lowe's filed a "Waiver of Service of Summons" on January 3, 1998 and timely filed its Answer on March 4, 1998. In its Answer, Lowe's denied all allegations of wrongdoing and asserted a Motion to Dismiss all claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Lowe's also asserted numerous affirmative and other defenses, including the defense of the statutes of limitations in connection with Petitioner's state tort claims.

On March 24, 1998, Petitioner filed a Motion to Amend the Complaint and a Proposed Amended Complaint. In his Amended Complaint, Petitioner attempts to assert two new causes of action: a federal claim for the violation of his Fourth Amendment right to be free from an illegal search and detention without probable cause and a state tort claim for intentional and negligent infliction of emotional distress. (Respdt. App. B) Various responses and replies were filed by the parties in connection with the pending motions.

On May 14, 1998, the United States District Court filed its Order and Judgment denying Petitioner's Motion to Amend the Complaint and granting Lowe's Motion to Dismiss. The District Court dismissed all of Petitioner's federal claims, and in its discretion, exercised supplemental jurisdiction over Petitioner's state tort claims and dismissed these claims as well. (Pet. App. B)

On June 11, 1998, Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Fourth Circuit. In an unpublished per curiam Opinion (decided August 26, 1998), the Fourth Circuit affirmed the rulings of the United States District Court. Upon receiving the Opinion of the Fourth Circuit, Petitioner filed a Petition for Rehearing and a Suggestion for Rehearing En Banc. These Petitions were denied by the Fourth Circuit on October 19, 1998.

Petitioner filed the instant Petition for Writ of Certiorari with the United States Supreme Court on February 1, 1999. Pursuant to Rule 15 of the Rules of the Supreme Court of the United States, Lowe's herein submits its responsive brief and respectfully requests that the Petition be denied.

B. Factual Allegations of Complaint

In his Petition to this Court, Petitioner recites and argues numerous facts which are not contained in the Complaint and therefore are irrelevant to the Rule 12(b)(6) motion in question. All of the factual allegations before the Court are contained in Paragraph 4 of the original Complaint. The proposed Amended Complaint contains no additional facts. (*See* Respdt. App. A, B).

In Paragraph 4 of his Complaint, Petitioner alleges as follows: On December 30, 1995, Petitioner went with his son to a Lowe's store located in Raleigh, North Carolina, in order to purchase a replacement water filter cartridge. Petitioner's son stayed in the car while Petitioner went into the store. After Petitioner found the filter cartridge, he was on his way to the checkout area when he noticed that the store was having a clearance on computers and related items. He found a number of good buys and began picking up items and examining them for purchase. Petitioner soon had more items than he could hold, so he placed the items into "an unattended shopping cart in the middle of an aisle with trash in the bottom which consisted of paper and cardboard fragments and flattened boxes." Petitioner alleges in the Complaint that after he put numerous items in the cart, he changed his mind about certain items. He then removed some items from the cart and proceeded to the checkout line, where he paid for the purchases and obtained a receipt.

In the Complaint, Petitioner alleges that as he was leaving the store, he was approached by a Lowe's Theft Prevention Officer named Gene Blount. At that point, the items which Petitioner had purchased were still in the cart with the trash and empty boxes. Petitioner alleges that Gene Blount approached him, asked to see his receipt, and then searched

Petitioner's parcels and threw the trash out of the cart. These are the only actions alleged by Petitioner in connection with Gene Blount. There are no allegations that Gene Blount attempted to detain Petitioner, that he made Petitioner return to the store or that Gene Blount took any further action against Petitioner. Petitioner alleges in the Complaint that he was free to go after Gene Blount verified his receipt. There are no allegations that Gene Blount called Petitioner any names or that any racial comments of any nature were made by Gene Blount during his encounter with Petitioner.

Petitioner states in Paragraph 4 of the Complaint that after being approached by Blount, *Petitioner* became "extremely angry and released a barrage of verbal expletives which drove his assailant, the Lowe's Theft Prevention Officer, back into the establishment from whence he had come." Petitioner alleges that he went back into the store and inquired into the identity of Gene Blount. He further alleges that while he was in the store, an African American employee told Petitioner that he had been given "the nigger treatment." Petitioner refuses in the Complaint to identify the employee who allegedly made this comment, claiming that the employee "wished to remain anonymous." While Petitioner alleges in the Complaint that other white customers were allowed to leave the store without being approached, he provides no other factual allegations regarding the alleged white customers or the circumstances surrounding the other customers. There are no allegations that these other customers left the store with items in a cart containing empty boxes and trash as did Petitioner on the date in question when he was approached by Gene Blount for a receipt verification.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI PRESENTS NO VALID REASON JUSTIFYING FURTHER REVIEW OF THIS CASE BY THE SUPREME COURT OF THE UNITED STATES.

Review on a writ of certiorari is not a matter of right, but of judicial discretion, and a petition will be granted "*only for compelling reasons.*" Sup. Ct. R. 7. Although the list is not exhaustive, the Rules of the Supreme Court of the United States provide that a grant of certiorari is typically reserved for cases where:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

Jurisdiction to review judgments and decrees by certiorari is to be exercised sparingly, only in cases of "gravity and general importance," or where a "real and embarrassing conflict of opinion and authorities" exists among the courts of appeals. *State of Ohio ex rel. Seney v. Swift & Co.*, 260 U.S. 146 (1922).

In the instant case, the Petition for Writ of Certiorari fails to satisfy the criteria for review by this Court. First, Petitioner

effectively concedes that there is no conflict among the federal courts on the issue raised by this petition. Indeed, Petitioner himself cites only one case that appears to have addressed the issue of mercantile discrimination, *Priddy v. Shopko Corporation*, 918 F. Supp. 358, 359 (D. Utah 1995), which **supports** the dismissal of the complaint, in this case. Second, Petitioner has not and cannot show that the decisions of the Fourth Circuit and District Court departed in any way from the accepted course of judicial proceedings. To the contrary, as will be argued below, these courts properly concluded that Petitioner has no valid constitutional or statutory basis for his complaint. Third, the allegations of the Complaint fail to sufficiently allege a valid claim for racial discrimination, even if such a claim existed. Finally, this Court lacks the power to do what Petitioner ultimately seeks by this petition: to create a new cause of action for "racial profiling."

A. Petitioner's federal claims were properly dismissed by the District Court because Petitioner failed to allege a valid constitutional or statutory basis for recovery.

In the Complaint, Petitioner alleges that Lowe's violated his rights under the Thirteenth and Fourteenth Amendments of the United States Constitution. Petitioner further asserts that he has a federal cause of action against Lowe's for the violation of these constitutional rights pursuant to 42 U.S.C. §§ 2000(a-e), 1981, 1982, 1983 and 1985.

Clearly, no violation of the Thirteenth Amendment occurred, here. The Thirteenth Amendment of the United States Constitution prohibits slavery and involuntary servitude, which is not alleged here. Likewise, the Fourteenth Amendment has no application, since there is no state action, in this case. *West v. Atkins*, 487 U.S. 42 (1988).

Moreover, the Fourth Circuit and the District Court correctly concluded that none of the federal statutory provisions asserted in the Complaint provide a valid basis for recovery. 42 U.S.C. § 2000 and its subparts clearly do not apply to this action. Although 42 U.S.C. § 2000a prohibits discrimination "in places of public accommodation," this does not include public retail establishments. The statute itself lists the types of establishments within its purview, *i.e.*, those engaged in the selling of food, hotels or places of entertainment. Thus, in *Priddy v. Shopko Corp.*, *supra*, the court stated:

> It is clear that Congress did not intend for retail establishments . . . to be included in § 2000a . . . The clear implication of this provision is that Congress did not intend to include retail establishments . . .

Significantly, in his petition, Petitioner himself quotes this language from *Priddy*. (Petition p. 7)

The other subparts of 42 U.S.C. § 2000 also do not apply to the facts alleged in the Complaint. 42 U.S.C. § 2000b deals with actions filed by the Attorney General. Section 2000c concerns public education. Section 2000d prohibits the exclusion of federal assistance based upon race, and section 2000e concerns employment.

The Fourth Circuit and District Court also correctly ruled that Petitioner failed to assert a proper claim pursuant to 42 U.S.C. §§ 1983 and 1985. Section 1983 requires a showing of state action, which is not alleged or involved in this case. *Lugar v. Edmundson Oil Co.*, 457 U.S. 922, 937 (1982).

42 U.S.C. § 1985 prohibits conspiracies "between two or more persons." In this case, there are not even any *conclusory*

allegations in the Complaint regarding a conspiracy between two or more persons. Moreover, a corporation, such as Lowe's, cannot conspire with its own employees. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

The final statutory provisions asserted in the Complaint are 42 U.S.C. §§ 1981 and 1982. Section 1981 provides that all persons

> shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . .

Section 1982 provides that all citizens shall have the same right to "inherit, purchase, lease, sell, hold, and convey real and personal property."

In this case, the gravamen of Petitioner's complaint is that Petitioner was approached by a Lowe's employee who asked to verify Petitioner's receipt as he exited the Lowe's store carrying numerous items in a cart containing trash and empty boxes. There are no allegations that Petitioner's ability to make or enforce contracts was interfered with by the Lowe's employee on December 30, 1995. *See Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Moreover, there are no allegations that Petitioner's ability to inherit, purchase, sell, hold and convey property was jeopardized. Based upon Petitioner's failure to allege facts that would bring these statutes into play, the Fourth Circuit and District Court correctly ruled that Petitioner has no valid federal claim pursuant to these statutes.

B. The complaint does not allege intentional racial discrimination.

In his Petition, Petitioner all but admits that the Fourth Circuit and the District Court correctly applied the law in this case and that the above noted statutory provisions do not apply to the facts alleged in the Complaint. Petitioner instead argues that by dismissing his claims, the District Court effectively ruled that a claim for "racial profiling" does not exist and that it is now incumbent upon the Supreme Court of the United States to review this case and create a new cause of action for Petitioner.

Petitioner's argument is without merit. The rulings of the Fourth Circuit and the District Court do not stand for the proposition that a person who has been the victim of racial discrimination has no legal recourse. The courts ruled only that Petitioner's Complaint failed to state a valid claim. Numerous federal statutes prohibit racial and other discrimination. Also, numerous state tort claims exist which would prohibit discriminatory conduct, including but not limited to the claims of false imprisonment, malicious prosecution and emotional distress. In order to prevail on these claims, however, a plaintiff must allege proper facts supporting these claims and he must also file these claims prior to the running of the applicable statutes of limitations.

In this case, the face of the Complaint reveals that Petitioner has not alleged sufficient facts to support a claim based upon racial discrimination or "racial profiling." As such, even if there were no existing legal remedies for victims of racial profiling, which is denied, the instant case would not be a proper case for review by this Court.

An essential requirement of all claims based upon racial discrimination is that it be shown that the defendant acted with

the intent to discriminate due to the plaintiff's race. The federal courts have held that in order for a complaint alleging racial discrimination to be valid under 42 U.S.C. §§ 1981 or 1983, the complaint must contain more than conclusory allegations of racial discrimination. Although a plaintiff does not have to make an evidentiary showing at this stage, "[c]onclusory allegations of discrimination . . . not supported by any reference to particular acts, practices, or policies" are insufficient to state a claim of discrimination under § 1983. *United Black Firefighters of Norfolk v. Hirst*, 604 F.2d 844, 847 (4th Cir. 1979). In *Odum v. Columbia University*, 906 F. Supp. 188, 194 (S.D.N.Y. 1995), the court explained:

> Essential to an action under section 1981 are allegations that the defendants' acts were purposefully discriminatory and racially motivated . . . In order to survive a motion to dismiss a section 1981 claim, a Plaintiff must specifically allege the events claimed to constitute intentional discrimination as well as circumstances giving rise to a plausible inference of racially discriminatory intent. It is not enough for a Plaintiff to recite mere conclusory allegations.

(citations omitted).

Based on these principles, federal courts have routinely dismissed complaints pursuant to Rule 12(b)(6) where the complaints failed to sufficiently allege specific facts of racially motivated discrimination. The case of *Davis v. Frapolly*, 747 F. Supp. 451 (N.D. Ill. 1989) is illustrative. In *Davis*, the plaintiff alleged in his complaint that he had been arrested, detained and charged with a crime solely because he was black and that this conduct violated his federal constitutional rights. As to the plaintiff's § 1981 claim, the court dismissed the

complaint stating that the complaint contained nothing more than conclusory statements that the defendant acted out of a racially motivated discriminatory intent. The court noted that the only allegations contained in the complaint to this point were conclusions made by the plaintiff that the actions were taken against him because he was black. The court found these allegations insufficient stating:

> Plaintiff claims that he was arrested, detained and charged solely because he is a black man. Yet, the amended complaint contains no allegations of discriminatory intent. *There is not one fact from which the court can draw an inference that defendant's actions were at all motivated by plaintiff's race. Simply put, based upon the facts plaintiff alleges, the court cannot infer that if plaintiff were white he would have been treated differently. A mere conclusory allegation of intentional discrimination is insufficient. (Citations Omitted) Under the rule that plaintiff advances, every black person who is arrested would be able to successfully plead Sec. 1981 and equal protection claims based solely upon the fact of their race.*

Davis, 747 F. Supp. at 453.

In *Odum, supra*, the District Court dismissed the plaintiff's claim that a private school discriminated against her due to her race. The court noted that the plaintiff's complaint contained nothing more than conclusory allegations of racially motivated discrimination, stating:

> Even on a motion to dismiss, a court cannot accept naked assertions in a complaint that do not set forth supporting allegations of fact. A mere factual

> assertion of unequal treatment or race-motivated conduct is insufficient to survive a Rule 12(b)(6) motion; instead, a plaintiff must specifically allege the circumstances giving rise to a plausible inference of racially discriminatory intent.

Odum, 906 F. Supp. at 194-195.

In this case, the Fourth Circuit and District Court properly recognized that Petitioner's allegations of racially motivated discrimination were insufficient as a matter of law. The only facts alleged in the Complaint are that while exiting the store, Petitioner was approached by a Lowe's employee, Gene Blount, who searched Petitioner's bag and cart and verified his receipt. Petitioner does not allege that Gene Blount made any references to Petitioner's race during the encounter. Petitioner does not allege why race would have even factored in at all in connection with the decision of Gene Blount to approach Petitioner. In fact, the Complaint itself reveals that race was *not* a factor. In the Complaint, Petitioner specifically alleges that his cart was full of trash and empty boxes. This is why Petitioner was approached by Gene Blount. Petitioner alleges that Gene Blount went through the trash and boxes while verifying Petitioner's receipt. Clearly, the only reasonable inference that can be drawn from the Complaint is not that Petitioner was stopped because he is a black man but rather that Petitioner was approached because he was exiting the Lowe's store with a cart containing trash and empty boxes making it difficult for the Lowe's employee to determine if items not paid for might have been concealed in the cart.

It is important to note that Petitioner has not alleged any specific instances of other African Americans being approached or having their bags searched. There are no allegations of a plan or pattern on the part of Lowe's to discriminate. While

Petitioner alleges in the Complaint that white customers did not get stopped by Gene Blount, Petitioner does not allege that these customers were similar to Petitioner in that they were also exiting the store with a cart full of trash and empty boxes. In his Petition to this Court, Petitioner states that the white customers expressed dismay over the fact that Petitioner had been approached by Gene Blount. Even if this were relevant to the issue at hand and true, which is denied, no allegations to this effect are contained in the Complaint. This is but one example of how Petitioner argues facts to this Court in his Petition which are not contained in the pleadings in this case.

The only allegation in the Complaint regarding race is the alleged statement made by an unidentified black male in the store who allegedly stated that Petitioner got the "nigger treatment." Petitioner does not identify this person in the Complaint, alleging that this person wishes to remain anonymous. Lowe's contends that this statement is not a proper allegation for a complaint and that it should have been stricken from the Complaint in this case. Lowe's further contends that this statement, even if proper for a complaint, does not constitute a sufficient pleading of racial discrimination on the part of Lowe's. The statement is nothing more than a conclusory allegation of a third person expressing *his* opinion concerning Lowe's intent — it does not establish Lowe's intent any more than Petitioner's own opinion establishes such intent.

Accordingly, the Complaint in this case is not sufficient to support a claim of racial discrimination or "racial profiling" under any theory. The Complaint contains no valid factual allegations forecasting that the conduct of Gene Blount was racially motivated. The facts as alleged establish instead that Petitioner was approached because his cart was filled with trash and empty boxes. After Petitioner's receipt was verified, Gene Blount's encounter with Petitioner ended. Petitioner was not

asked to return to the store. Petitioner was not charged with any crimes. On his own, Petitioner chose to return to the store and it was Petitioner who engaged in a verbal "barrage" against Gene Blount. Petitioner alleges in the Complaint that *Petitioner* became "extremely angry and released a barrage of verbal expletives which drove his assailant, the Lowe's Theft Prevention Officer, back into the establishment from whence he had come." (Complaint, Paragraph 4) There are no allegations in the Complaint that Gene Blount responded in kind to Petitioner or that Gene Blount's interest in Petitioner continued after the verification of the store receipt.

Clearly, the allegations of the Complaint do not justify further review by this Court. While Lowe's certainly does not condone "racial profiling," the facts of the instant case do not establish discrimination of any nature on the part of Lowe's. The only thing established by the Complaint is that Petitioner, a black male, had his receipt verified as he exited Lowe's store while pushing a cart full of trash and empty boxes. Based upon the failure of Petitioner to allege sufficient factual allegations of racial discrimination, the Fourth Circuit and District Court properly dismissed Petitioner's federal claims.

C. This Court cannot legislate a new cause of action.

Finally, it is clear that the Petitioner urges this Court to do that which it is constitutionally prohibited from doing: to create a "new" federal cause of action against "racial profiling." Although Lowe's contends, primarily, that such a result is not warranted under the allegations of the Complaint, in this case, it further contends that even in a different case, alleging intentional racial discrimination by a retailer, such a result would be improper. It has long been recognized that this Court can only interpret the law, including the federal statutes and the Constitution; it has no inherent power or authority to

legislate new laws. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803); *McCray v. United States*, 195 U.S. 27 (1904). Thus, because the Complaint fails to state a cognizable claim for relief, and the Court lacks the authority to create a new cause of action not authorized by the Constitution or federal law, there are clearly no compelling circumstances warranting the granting of a writ, in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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